IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Appeal From Order No 54l of 2005
with
Civil Appln No.l22l of 2005
with
Civil Appln No 638 of 2005

M/s K T Desai and Associates
through its partner .. Appellant

vs

Simphony Coop Hsg Socy Ltd & ors.. Respnodents

Mr Sandesh D Patil for appellant

Mr.S.N.Satpute i/b M/s Satpute and Co for
respondent no.l

CORAM; A.M.KHANWILKAR J.

DATED 9.3.2006

P.C.

l. Heard learned counsel for the parties. Perused the relevant record. This appeal takes exception to the judgment and order passed by the Joint Civil Judge Senior Division, Thane dated l9.4.2005 below Exhibit 5 in Special Civil Suit No. l84 of 2004.

2. The appellant filed the suit before the trial court on the assertion that the he is a member of the respondent society. As the respondent society

was in difficulty, on account of non-completion of the construction of the building by the earlier contractor, the appellant took upon himself that responsibility. Accordingly, the appellant and the respondent society entered into an agreement dated l3.l0.2002 whereunder the appellant undertook to complete the remaining work of the building within 8 months from the date of the agreement. It is not necessary to refer to the various terms of the agreement at this stage. Suffice it to observe that the appellant failed to complete the construction work within the stipulated time. As the respondent society was hard pressed on account of the condition of lease, on which the plot has allotted to the respondent society by CIDCO, it had no option but to invoke the understanding between the parties on account of the failure of the appellant to complete the work within the stipulated time provided under the agreement and time being the essence of the contract, the agreement was required to be terminated by the respondent society, which resolution was passed on 5.4.2004. The appellant, as mentioned earlier, filed the suit before the trial court amongst others for the following reliefs:

"a) The defendant no.l be directed to pay Rs.7,00,000 to the plaintiff towards the work which is completed by the plaintiff on behalf of the defendant no.l

b) The defendant be directed to pay the interest at @ 2l% p.a till amount will be paid and realised.

c) The defendant no.l be restrained from terminating the suit agreement dt l3.l0.2002 by the order of perpetual injunction of this Hon'ble court.

d) Pending the hearing of the suit the defendant no.l be restrained from terminating the suit agreement dt l3.l0.2002 by the order of ad-interim injunction of this Hon'ble court.

e) The defendant no.l be restrained from assigning the remaining work to any other contractor as scheduled in the meeting to be held on l5.4.2004.

f) Pending the hearing of the suit the defendant no.l be restrained from assigning the remaining work to any other contractor as scheduled in the meeting to be held on l3.4.2004.

g) The members of defendant no.l be restrained from removing the locks of the flats and to take forceful possession of the flats by the order of perpetual injunction of this Hon'blde Court.

h) Pending the hearing of the suit the members of the defendant no.l be restrained from removing the locks of the flats and to take forceful possession of the flats by the order of ad-interim injunction of this Hon'ble court.

i) It may be declared that defendant no.l has no locus standi to terminate the suit agreement unilaterally.

j) The defendant no.2 be restrained from issuing occupation certificate in favour of the defendant no.l or any other person or

persons claiming through it by the order of perpetual injunction.

k) Pending the hearing of the present suit the defendant no. 2 be restrained from issuing occupation certificate in favour of the defendant no.l or any other person or persons claiming through it by the order of ad-interim injunction.

l) The cost of suit be awarded.

m) Any other and further relief be granted"

3. It cannot be doubted that the said agreement was in the nature of a development agreement. It is well settled that no relief of specific performance can be granted with regard to the development agreement. The appellant, however, has couched reliefs, which in substance is, relief of specific performance of the agreement. Be that as it may, the appellant moved an application below Exh 5 for interim relief during the pendency of the suit consistent with the relief in prayer clauses (d), (f), (h) and (k), which are reproduced above. The matter was contested before the trial court by both sides. According to the respondent society the agreement was arrived at with the appellant clearly providing for outer limit for completion of the construction work. The case of the respondent society is that as per the agreement the work was assigned at lump sum construction cost at

Rs.l7,89,000 with no provision of escalation in price of any item for any reason whatsoever. It is the case of the respondent society that as and when the work progressed and the estimate of such work

was certified by the architect, the respondent society made payment to the appellant. The respondent has thus made aggregate payment of Rs.l5.59 lacs as against the certification amount of Rs.l3,23,860 of the construction work completed by the appellant in terms of the architect's certificate. It is the case of the respondent society that in fact the respondent is entitled to recover the excess payment already made to the appellant. In addition, the society can also claim amount of damages as per the agreement at the rate of Rs.l000 per day limited to maximum period of l0 days from the record date of completion of work and thereafter it is deemed that the contract is cancelled and the contractor will have no right or any claim against the society. The time was essence of the contract as mentioned earlier. In view of the condition imposed by the CIDCO for allotting the plot the construction was required be completed as per clause 23 of the lease agreement, failing which the respondent society was liable to pay premium at the scale provided in the regulation 7 of the New Mumbai Disposal of Lands Regulations, l975, which would be ranging from 25% to 50%. On the above basis the respondent

society resisted the interim relief claimed by the appellant.

4. The trial court on analyzing the materials on record took a view that admittedly the construction work was to be completed within 8 months from the date of the agreement. The trial court further held that the appellant has failed to produce any material to substantiate its plea that the respondent society or its members were responsible for the delay in completion of the construction work. The trial court even noted that the real controversy between the parties will be with regard to the money claim. On the basis of the rival claim which will have to be proved at the trial, the interim reliefs as prayed cannot be granted and if it is found that the respondent society or its members were responsible for the delay in completion of the work, the plaintiff can always claim compensation. Besides, the trial court has found that as per the agreement, on failure of the appellant to complete the work within the stipulated time, the contract would be deemed to be cancelled. In any case the respondent society has terminated the contract in view of the resolution dated 5.4.2004 and that the appellant has not sought any declaration that the said act of the respondent

society was illegal. On the above basis the court below has recorded clear finding of fact that the appellant failed to make out prima facie case and,therefore, proceeded to reject the application. The prima facie case as well on the issues of balance of convenience and irreparable loss were answered in favour of the respondent society, on which basis the application for interim relief of injunction came to be rejected.

5. Before this court, the limited grievance made by the counsel for the appellant is that the trial court has filed to address itself to the basic issue that the appellant was in possession of some of the premises constructed by him and appellant had prayed for relief of injunction in terms of prayer clause (c) of the interim application,which corresponds to prayer clause (g) of the relief claimed in the paint referred to above.

6. It was then contended that as the trial court has not addressed itself to the above aspect at all the appropriate course will be to relegate the parties to the trial court to answer this issue. At the first blush the argument seems to be attractive but the same is devoid of any substance. This

argument clearly overlooks that as is noted by the court below the main controversy between the parties revolves around the reliefs claimed by the appellant which is with reference to the claim of Rs 7 lacs-which is the substantive relief claimed in the plaint. According to the respondent,however, the respondent society is entitled for refund of excess payment made to the appellant and also for damages in terms of the agreement between the parties. If such is the nature of the dispute as per the substantive relief claimed, the question is: whether the plaintiff, as incidental relief, can claim that he is entitled to injunction in terms of prayer clause (g) above so that he is not dispossessed from the premises which were stated to be in his occupation. In my opinion, on the finding reached by the trial court as referred to earlier, with which I am in agreement, question of granting relief of injunction as pressed in such a case does not arise. For there is no legal right in favour of the appellant to retain or assert to be in lawful possession. The learned counsel for the appellant to over come this position, relied upon section 202 of the Contract Act, l972 to contend that undisputedly the appellant is also a member of the respondent society. In that capacity he is

interested in the property which forms the subject matter of agency and for which reason the appellant would be entitled to protect his possession of the subject property.This submission clearly overlooks that the subject matter before the trial court is in relation to the agency agreement and not referable to any right arising in favour of the appellant being a member of the society. In fact if the appellant is invoking his right or interest as member of the respondent society who in turn is owner of the property, then it is obvious that appellant is taking conflicting stand with regard to the subject matter. Because being member of the society his concern should be to secure the interest of the society and not to contest the legitimate claim of the respondent society which is for recovery of the excess payment made to the contractor employed by the society. Besides, the society may also claim damages in terms of the agreement with the contractor. Viewed in this perspective the question of granting any relief even in terms of prayer clause (g) above as is prayed for by the appellant does not arise in the fact situation of the present case. In my opinion, as the development agreement has been terminated the appellant cannot resist the respondent society from

enjoying the property in accordance with law. However, the appellant has not challenged the decision of the society of terminating the contract. Accordingly, this appeal fails and same is dismissed with costs. For the aforesaid reason even the cognate application is dismissed.

7. At this stage Mr.Satpute, counsel for the respondent society points out that taking advantage of the order of status quo passed by this court on l5.6.2005 the appellant has put locks on the premises and is creating obstruction to the society. There is no material before this court that after the order of status quo some developments have taken place. The respondent society may apply to the trial court for appropriate relief if so advised which aspect will be considered on its own merits on the basis of the materials produced before the trial court. Ordered accordingly.